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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

SCOTT HUDDLESTON, Appellant

v.

THE STATE OF TEXAS, Appellee

ON THE STATE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE ELEVENTH COURT OF APPEALS
JONES COUNTY

APPELLANT'S MERITS BRIEF

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant, Scott Huddleston, submits this brief in accordance with this Court's May 19, 2021 order granting the State's discretionary-review petition and ordering expedited briefing.

ISSUE PRESENTED

ISSUE (RESTATED): Is a defendant's right to be personally present at his guilty-plea proceeding a "substantive" right and, if so, which harm analysis, if any, applies when the government unlawfully deprives a person of this right through the use of its emergency powers?

STATEMENT OF FACTS

Over appellant's objection (RR 4-8), the trial court "suspended" appellant's right to be personally present at his guilty-plea proceeding pursuant to a Texas Supreme Court emergency order made "in response to the imminent threat of the Covid-19 pandemic." *See Seventeenth Emergency Order Regarding COVID-19 State of Disaster*, 609 S.W.3d 119 (Tex. 2020). This Texas Supreme Court emergency order provided that "[s]ubject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant's consent [m]odify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order…" *See id*.

SUMMARY OF THE ARGUMENT

ISSUE: The resolution of this case essentially comes down to a question of legislative intent which requires a decision that the trial court had no emergency authority or jurisdiction to do away with appellant's right under Article 27.13 to be personally present at his guilty-plea proceeding and that the Legislature intended for the government to suffer the inconvenience of appellant exercising this "substantive" right at another guilty-plea proceeding.

ARGUMENT

ISSUE (RESTATED): Is a defendant's right to be personally present at his guilty-plea proceeding a "substantive" right and, if

so, which harm analysis, if any, applies when the government unlawfully deprives a person of this right through the use of its emergency powers?

Is this case really just about a guilty-pleading defendant getting everything he wants except for "a trip to the county courthouse"? Or is this case about the judiciary's responsibility to closely scrutinize governmental use of emergency powers to do away with people's rights and what to do about it when these powers are misused?

Under Section 22.0035(b) of the Texas Government Code, It Makes No Difference In This Particular Case Whether The Article 27.13 Right Is "Substantive" Or "Procedural"

The Texas Supreme Court emergency order at issue here (and the order from which the trial court derived its authority to "suspend" appellant's Article 27.13 right in this case) was issued by authority of Section 22.0035(b) of the Texas Government Code which, in relevant part, provides that the "supreme court may modify or suspend procedures for the conduct of any court proceeding affected by a disaster declared by the governor" (with the governor's disaster declaration in this case being the threat of the Covid-19 pandemic). The House Research Organization bill analysis of Section 22.0035(b) indicates that Section 22.0035(b) was enacted in response to Hurricanes Rita and Ike which resulted in "flawed coordination and execution of emergency judicial measures in areas severely affected by the hurricanes" and as a "result, the basic judicial functions of several

courts ground to a halt, leaving parties without access to courts and struggling to meet statutory deadlines." *See* House Research Organization April 24, 2009 analysis of HB 1861.[1]

Section 22.0035(b) was meant to "allow for the continued operation of essential judicial functions in the event of a disaster" and "to grant the Supreme Court the flexibility necessary to undertake emergency measures to prevent inadvertent prejudice of parties' legal rights." *See* House Research Organization April 24, 2009 analysis of HB 1861. For example, "in the event that a disaster made it impossible for a party to file an action in the proper county of venue, the Supreme Court could suspend the running of the statute of limitations in order to prevent the party's claim from being barred through no fault of the party." *See id*. By "rule or order, or on a case-by-case basis, the Supreme Court could provide abatements and stays; suspend the running of the statute of limitations; suspend or modify other filings and service deadlines; provide for hearings or trials at locations other than the county of suit; provide for courts of appeals[s] to accept filings and hear arguments in remote courthouses; and provide for alternative notice requirements." *See id.*

Section 22.0035(b) was meant by the Legislature to "allow for the continued operation of essential judicial functions in the event of a disaster" and "to grant the

[1] Acts 2009, 81st Leg., ch. 1281, § 1 (HB 1861) (eff. 6/19/09).

Supreme Court the flexibility necessary to undertake emergency measures to prevent inadvertent prejudice of parties' legal rights."[2] *See* House Research Organization April 24, 2009 analysis of HB 1861. It does not empower the government to use these emergency powers to "suspend" even "procedural" rights just for the sake of convenience or to make people's lives easier.

In this case, the trial court's suspension of appellant's Article 27.13 right was not necessary "for the continued operation of essential judicial functions." These judicial functions would have continued to operate even with appellant getting, as the State puts it, "a trip to the county courthouse."

The trial court did this apparently "to avoid risk to court staff, parties, attorneys, jurors, and the public" from the Covid-19 pandemic.[3] But, allowing appellant to exercise his Article 27.13 right would not have worsened the Covid-19 pandemic any more than would the jury trial in the misdemeanor case that the State insisted on having in *In re State ex. Rel. Ogg*, 618 S.W.3d 361 (Tex. Crim. App. 2021).

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[2] For example, probably no one would argue that the Legislature meant for the government to use these emergency powers to shorten a filing deadline (to a party's prejudice by, for example, making "it impossible for a party to [timely] file an action in the proper county of venue") even though this would literally fall within Section 22.0035(b)'s "modify or suspend procedures" language and the "[m]odify or suspend any and all deadlines and procedures" language in the Texas Supreme Court's emergency order in this case. Section 22.0035(b) would permit the government to use these emergency powers to extend such a deadline (but not to shorten it).

[3] This "to avoid risk to court staff, parties, attorneys, jurors, and the public" is not mentioned in Section 22.0035(b). This raises the question of whether Section 22.0035(b) authorizes the Texas Supreme Court to even issue emergency orders for this purpose "in response to the imminent threat of the Covid-19 pandemic." *See Pope v. Ferguson*, 445 S.W.2d 950, 952 (Tex. 1969) (Texas Supreme Court has no "inherent power" and "has only such jurisdiction as is conferred upon it by the Constitution and statutes of the State") (internal quotes omitted).

Legislature Intended For Article 27.13 Right To Be "Substantive"

Article 27.13 of the Texas Code of Criminal Procedure contains a guilty-pleading defendant's right to be personally present at his guilty-plea proceeding. Article 27.18(a) sets out how this defendant can waive this Article 27.13 right so that the trial court can accept his guilty plea "by broadcast by closed circuit video teleconferencing to the court." Article 27.19(a) provides that a guilty-pleading defendant incarcerated in a penal institution can do the same thing or "mail in" his plea to the trial court. Taken together, these statutory provisions leave it within the guilty-pleading defendant's control of whether he will exercise his right to personally appear at his guilty-plea proceeding or whether he will do it remotely or whether he will "mail it in" if he is incarcerated in a penal institution.

So why would the Legislature do this? The requirements set out in Articles 27.18(a) and 27.19(a) for waiving Article 27.13's in-person requirement are instructive. These requirements obviously are most concerned with facilitating or safeguarding the guilty-pleading defendant's right to counsel.[4] This indicates that Article 27.13's in-person requirement was primarily meant to also safeguard this right.[5] This is probably because a guilty plea is a "significant event" in the

[4] Even a guilty-pleading defendant who "mails in" his plea to the trial court has to be "notified by [the trial court] of the right to counsel and the procedures for requesting appointment of counsel" and has to be "provided a reasonable opportunity to request a court-appointed lawyer." *See* Article 27.19(a)(2)(A).

criminal process during which a guilty-pleading defendant gives up important rights. *See, e.g., Ex parte Tuley*, 109 S.W.3d 388, 391-96 (Tex. Crim. App. 2002) and at 400 (Hervey, J., dissenting).[6]

This all should be taken as an indication that the Legislature considered the Article 27.13 in-person right to be an important "substantive" right and not the insignificant, nonvaluable procedural right that the State claims it is.

State's Model For Determining "Substantive" And "Procedural" Rights

Appellant contends that the legislative determination that the Article 27.13 in-person right is a "substantive" right makes it unnecessary to consider the State's model for distinguishing "substantive" and "procedural" rights. Even if this Court considers this model, appellant contends that it does not support a decision that this Article 27.13 right is "procedural" for Section 22.0035(b) purposes.

The State's model presents a host of cases considering in "numerous contexts" whether a particular right is "substantive" or "procedural" for parties, trial courts and appellate courts to wade through as aids for making these determinations in the

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[5] Article 27.13's requirement that a guilty plea in a felony case "must be made in open court by the defendant in person" is also probably meant to assure the trial court (and appellate courts evaluating "involuntary plea" claims) that the defendant's guilty plea is "voluntary." These requirements are relaxed for guilty pleas in misdemeanor cases. *See* Article 27.14, Texas Code of Criminal Procedure.

[6] This could in large part explain why the Legislature would make it within the guilty-pleading defendant's control of whether he will personally appear at his guilty-plea proceeding. In addition, allowing trial courts to conduct these proceedings remotely without a defendant's consent could open the door to a number of post-conviction deprivation-of-counsel claims limited only by a defense lawyer's imagination all centering on the guilty-pleading defendant not having personal access to his lawyer.

future. The State's brief says that, under this model, "[m]ost rights, even really important ones, are procedural" which the government apparently could "suspend or modify" through its emergency powers.

Appellant contends that these cases should not be considered very helpful in determining whether a particular right is "substantive" or "procedural" for Section 22.0035(b) purposes. For example, the State's model says that Texas' state-law provisions in Article 38.22 of the Texas Code of Criminal Procedure (governing the admissibility of a defendant's statements made during police "custodial interrogation") are "procedural." It is highly unlikely that Section 22.0035(b) was intended to permit the governmental use of emergency powers to "suspend" these Article 38.22 rights (even to protect us from Covid-19).[7] In addition, the State recognizes (on page eleven of its brief) that its model may also be contrary to this

[7] In its brief in *Ogg,* the State took a different position arguing that the trial court's interpretation of the emergency order in that case was too broad and that "under th[is] broad reading of the order employed by the trial court, it could [dangerously] suspend any number of non-constitutional protections a criminal defendant has, such as arts. 38.22 & 38.23-procedures governing suppression of statements and illegally obtained evidence-as these protections grant broader protections than the constitution demands" and that a "more limited interpretation of the emergency order" would temper this "absurd result." *See* State's *Ogg* brief at 3 and at 12-13 (arguing that the "implications of the [Court of Appeals'] erroneous opinion are extreme" by, for example, "dangerously" allowing "trial courts to suspend other substantive privileges like arts. 38.22 and 38.23" which should "fall outside of the parameters" of Section 22.0035(b)) and at 13 ("The ability for a trial court to selectively ignore statutes and rules would be applicable in every case. A trial court could completely ignore the requirements of, for example, art. 38.22."). It might appear that the State would have courts read these emergency powers narrowly when it comes to "suspending" state rights but broadly when it comes to suspending people's rights which is probably another reason for courts to closely scrutinize governmental use of these emergency powers.

Court's decision in *Ogg*.[8]

Appellant contends that this Court could decide that a guilty-pleading defendant's right under Article 27.13 to be personally present at his guilty-plea proceeding is a "substantive" right on the basis of this Court's decision in *Lilly v. State*, 365 S.W.3d 321, 328 (Tex. Crim. App. 2012) stating (not as *dicta* but as an important basis for the decision in that case) that a guilty-plea proceeding (which includes this Article 27.13 right) is a "trial" under state law. Unable to find any cases saying that a defendant's right to be personally present at his trial is a nonvaluable "procedural" right, appellant contends that his Article 27.13 right to be personally present at his guilty-plea proceeding (i.e., a "trial" under *Lilly*) should not be considered anything but "substantive."[9]

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[8] The State also seems to suggest (on page 5, footnote 16 of its brief) that "evidentiary" rules are also "procedurally based rights" which raises the question of whether the government could do away with the rules of evidence under its emergency powers.

[9] In support of his claim that this Article 27.13 right is a "substantive" right, appellant, in his reply brief in the Court of Appeals, cited to the Texas Supreme Court's decision in *In re Commitment of Bluitt*, 605 S.W.3d 199, 204 (Tex. 2020) which decided that the statute at issue in that case (which is similar to Article 27.13) requires, in a non-Covid-19 world, the person's physical appearance at this person's civil trial to indefinitely commit this person as a sexually violent predator under Chapter 841 of the Texas Health and Safety Code. The State argues that *Bluitt* does not support deciding that the Article 27.13 right is a "substantive" right for Section 22.0035(b) purposes because *Bluitt* "did not purport to classify" the similar right at issue in that case as "substantive" or "procedural." That may be true. But the citation to *Bluitt* was not made to support an argument that the Texas Supreme Court classified the right at issue in that case as "substantive." It was cited to highlight that the Texas Supreme Court did consider this to be an important right such that it probably would decide that it is a "substantive" right for Section 22.0035(b) purposes if it had to decide that question. Appellant contends that *Bluitt* does lend some support to his claim that his Article 27.13 right is a "substantive" right for Section 22.0035(b) purposes.

Legislative Response To The Court Of Appeals' Decision In This Case

The Court of Appeals essentially decided that the trial court had no jurisdiction or authority to suspend appellant's Article 27.13 right because this right is a "substantive" right. *See Huddleston v. State*, No. 11-20-00147-CR slip op. at 4 (Tex. App.—Eastland, delivered March 11, 2021). It is as if the Court of Appeals decided that the Legislature had written a law expressly saying this (or at least expressly saying that the Article 27.13 right is a "substantive" right).

Several bills (House Bills 3611 and 3774 and Senate Bill 690) introduced in the most recent Legislature unsuccessfully tried to change this by more or less providing that a trial court could conduct a guilty-plea proceeding remotely without the parties' consent. House Bill 3611 and Senate Bill 690 (both of which are available for reviewing on Texas Legislature Online) were never voted on by either the House or the Senate. A version of House Bill 3774 (which is also available for reviewing on Texas Legislature Online) containing such a provision (in Section 20 of this version) passed the House but this provision (Section 20) had been removed or dropped from the Senate version that passed the Senate. *See* May 29, 2021 Conference Committee Report on HB 3774 at 42-45 (section-by-section analysis comparing House and Senate versions of HB 3774).[10]

[10] According to the information set out on Texas Legislature Online describing the actions taken on HB 3774, it appears that both the House and the Senate adopted and voted for this Conference Committee Report on May 30, 2021.

This is more than just legislative silence. *See Marin v. State*, 891 S.W.2d 267, 272-73 (Tex. Crim. App. 1994) ("When the Legislature meets, after a particular statute has been judicially construed, without changing that statute, we presume the Legislature intended the same construction should continue to be applied to that statute."). The Legislature actually considered changing the Court of Appeals' decision but ultimately did not. Under these circumstances, this Court should presume that a majority of the Legislature approved of this decision. *Cf. id*.

This would make it unnecessary for this Court to consider whether this case is like *Ogg* (essentially because of the presumption that a majority of the Legislature approved of the Court of Appeals' decision in this case) which would also make it unnecessary to decide which harm analysis in Rule 44.2 of the Texas Rules of Appellate Procedure to apply.

This Case Is Also Like *Ogg*

It was unnecessary for *Ogg* to classify the right at issue in that case[11] as either "procedural" or "substantive" because a trial court does not have jurisdiction to conduct a bench trial without the State's consent and the Texas Supreme Court's emergency order could not create this jurisdiction where none existed before. *See Ogg*, 618 S.W.3d at 363-66 and at 364 (language in Texas Supreme Court's emergency order "to modify or suspend 'deadlines and procedures' presupposes a

[11] This right is the State's right to withhold its consent to a defendant's jury-trial waiver.

pre-existing power or authority over the case or the proceedings"). The State claims that this makes *Ogg* distinguishable from this case because the trial court in this case had the pre-existing power or authority to accept appellant's felony guilty plea.

Of course, the trial court in this case had this pre-existing authority or jurisdiction to accept appellant's felony guilty plea. *See generally Davis v. State*, 956 S.W.2d 555 (Tex. Crim. App. 1997) and at 558 ("jurisdiction encompasses only the power of the tribunal over the subject matter and the person"). But this jurisdiction does not include any emergency powers to do away with people's "substantive" and "procedural" rights.

The authority or jurisdiction for these emergency powers has to come from somewhere else. *See Holloway v. State*, 360 S.W.3d 480, 485 (Tex. Crim. App. 2012) ("A trial court must derive its jurisdiction from either the Texas Constitution or our state legislative enactments.") *overruled on other grounds by Whitfield v. State*, 430 S.W.3d 405, 409 (Tex. Crim. App. 2014). Section 22.0035(b) supplies the authority or jurisdiction for governmental emergency orders to "modify or suspend" only "deadlines" and "procedural" rights but not "substantive" rights.[12]

So this case is like *Ogg* in the sense that the trial courts in both of these cases

[12] This too seems to be what the State argued in *Ogg*. *See* State's *Ogg* brief at 8 ("The Supreme Court's authority to suspend statutes is limited by legislative authorization.") and at 10 ("The Supreme Court's order is implicitly limited by the Legislature's grant of authority in section 22.0035 and the Supreme Court could not act beyond that grant.").

lacked the authority or jurisdiction to do what they did albeit for different reasons. In *Ogg*, it was because the trial court had no pre-existing jurisdiction over a bench trial without the State's consent and Section 22.0035(b) could not have supplied the trial court with that jurisdiction. In this case, the trial court had pre-existing jurisdiction over the proceeding to accept appellant's guilty plea but Section 22.0035(b) did not supply it with the jurisdiction to suspend appellant's Article 27.13 "substantive" right at this proceeding.

Harm

Assuming that the error in this case is subject to a harm analysis, appellant contends that the harm analysis for constitutional error should apply. *See* Tex. R. App. P. 44.2(a) (setting out harm analysis for constitutional error). The trial court's error suspending appellant's Article 27.13 right deprived appellant of a "substantive" right that he had the right to expect under state law. This violates core federal constitutional due-process principles. *See Jimenez v. State*, 32 S.W.3d 233, 244-45 (Tex. Crim. App. 2000) (McCormick, P.J., concurring in result) (and authorities cited therein) (due process of law is the guarantee that a person receives whatever the constitution and state law provide and what state law gives that person the right to expect). In addition, the governmental use of emergency powers to do away with people's rights should be subject to an elevated harm standard when the government (even innocently) misuses these powers.

The State argues that the harm analysis for non-constitutional error should apply and that the government doing away with appellant's Article 27.13 right could have caused him "no conceivable harm." *See* Tex. R. App. P. 44.2(b) (requiring appellate courts to disregard errors that do not "affect substantial rights"). This harm standard is usually stated in terms of whether and how much a particular error affected the result of the proceeding. *See King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (for purposes of Rule 44.2(b) non-constitutional harm standard, a "substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict"); *see also Barshaw v. State*, 342 S.W.3d 91, 93-94 (Tex. Crim. App. 2011) (appellate court should disregard non-constitutional error if it has "fair assurance that the error did not influence the jury, or influenced the jury only slightly"). This language was taken from the Supreme Court's decision in *Kotteakos v. United States*, 328 U.S. 750 (1946) which this Court has stated it would look to for guidance since *Kotteakos* was interpreting the federal version of Texas' Rule 44.2(b) non-constitutional harm standard. *See Johnson v. State*, 43 S.W.3d 1, 4 (Tex. Crim. App. 2001). This *King* harm standard is met in this case because appellant suffered a conviction in this proceeding because of the trial court's error when otherwise he would not have.

This Court has stated that the *King* test "is not helpful in evaluating error in

non-jury proceedings" and that to "determine whether an error 'affect[ed] substantial rights,' we consider whether a party had a right to that which the error denied." *See Johnson v. State*, 72 S.W.3d 346, 348 (Tex. Crim. App. 2002). That standard is also met in this case because appellant's "substantive" Article 27.13 right is a "substantial" one. This is also consistent with the Supreme Court's decision in *Kotteakos* that the federal harmless-error rule was meant to apply to "technical" (not "substantive") errors. *See Kotteakos*, 328 U.S. at 760 and at 758-62 stating (with citations to authorities, footnotes, most quotes and other technical things omitted):

> The salutary policy embodied in [the federal harmless error statute in Section 269 of the Judicial Code] was enacted by Congress in 1919 after long agitation under distinguished professional sponsorship and after thorough consideration of various proposals designed to enact the policy in successive Congresses from the Sixtieth to the Sixty-fifth. It is not necessary to review in detail the history of the abuses which led to the agitation or of the progress of the legislation through the various sessions to final enactment without debate. But anyone familiar with it knows that [Section 269] and similar state legislation grew out of widespread and deep conviction over the general course of appellate review in American criminal causes. This was shortly, as one trial judge put it after [Section 269] had become law, that courts of review, tower above the trials of criminal cases as impregnable citadels of technicality. So great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained.
>
> In the broad attack on this system great legal names were mobilized, among them, Taft, Wigmore, Pound and Hadley, to mention only four. The general object was simple, to substitute judgment for automatic application of rules; to preserve review as a check upon

arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record.

The task was too big, too various in detail, for particularized treatment. The effort at revision therefore took the form of the essentially simple command of [Section 269]. It comes down on its face to a very plain admonition: "Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects." **It is also important to note that the purpose of the bill in its final form was stated authoritatively to be "to cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights, otherwise they are to be disregarded." But that this burden does not extend to all errors appears from the statement which follows immediately. "The proposed legislation affects only technical errors. If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will, notwithstanding this legislation, rest upon the one who claims under it."**

Easier was the command to make than it has been always to observe. This, in part because it is general; but in part also because the discrimination it requires is one of judgment transcending confinement by formula or precise rule. That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance. What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another.

Moreover, lawyers know, if others do not, that what may seem technical may embody a great tradition of justice, or a necessity for drawing lines somewhere between great areas of law; that, in other words, one cannot always segregate the technique from the substance or the form from the reality. It is of course highly technical to confer

> full legal status upon one who has just attained his majority, but deny it to another a day, a week or a month younger. Yet that narrow line, and many others like it, must be drawn. The "hearsay" rule is often grossly artificial. Again in a different context it may be the very essence of justice, keeping out gossip, rumor, unfounded report, second-, third-, or further hand stories.
>
> All this hardly needs to be said again. But it must be comprehended and administered every day. The task is not simple, although the admonition is. Neither is it impossible. By its very nature no standard of perfection can be attained. But one of fair approximation can be achieved. Essentially the matter is one for experience to work out. For, as with all lines which must be drawn between positive and negative fields of law, the precise border may be indistinct, but case by case determination of particular points adds up in time to discernible direction.
>
> In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations. Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment.

See Kotteakos, 328 U.S. at 758-62 (emphasis supplied).

The error in this case was not just some "technical" error with the harm question being whether this "technical" error affected appellant's "substantial rights." The error in this case was a "substantive" error and, therefore, affected a "substantial right."

The State's "no conceivable harm" argument seems to boil down to a claim that this case should not be reversed when everyone knows the result will be the same on remand. *Kotteakos* rejected such a claim as being an inappropriate

consideration in a harm analysis. *See Kotteakos*, 328 U.S. at 776 ("That conviction would, or might probably, have resulted in properly conducted trial is not the criterion of [Section 269].").

On this record and based on the foregoing discussion from *Kotteakos*, it would seem that the only way that the trial court's deprivation of appellant's "substantial" Article 27.13 right could be harmless in this particular case is if the record showed that appellant was physically present with his counsel during the remotely held guilty-plea proceeding (given that Article 27.13 and its "substantive" requirement of the defendant's physical presence is primarily meant to safeguard the right to counsel). Absent this, the government should be required to suffer the inconvenience of a do over.

PRAYER

Appellant Scott Huddleston asks this Court to affirm the Eastland Court of Appeals' judgment and for any other relief that this Court may deem appropriate.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this *Appellant's Brief* was served upon opposing counsel noted below, by one or more of the following: certified mail (return receipt requested), facsimile transfer, or electronic mail (e-mail), this 7th day of June 2021.

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2)(B) because this brief contains 4,831 words.

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